

2  
No. 98 - 1288

Supreme Court, U.S.

FILED

MAY 26 1999

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

**VILLAGE OF WILLOWBROOK, an Illinois municipal  
corporation, GARY PRETZER, individually and  
as President of the VILLAGE OF  
WILLOWBROOK, and PHILIP J. MODAFF,  
individually and as Director of Public Services  
of the VILLAGE OF WILLOWBROOK,**

*Petitioners,*

v.

**GRACE OLECH,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Seventh Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION TO  
THE PETITION FOR A WRIT OF CERTIORARI**

**JOSETTE SKELNIK  
LAW OFFICES OF  
JOSETTE SKELNIK  
167 East Chicago Street  
Elgin, Illinois 60120  
(847) 742-5220**

*Counsel of Record  
for Respondent*

# TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING WRIT .....	9
I. THE PETITION FOR A WRIT OF <i>CERTIORARI</i> SHOULD BE DENIED BECAUSE THE PETITIONERS DID NOT PROPERLY RAISE BELOW THE CONTENTION THAT THEY SEEK TO RAISE HERE, AND BECAUSE THE COURT OF APPEALS IN THIS CASE PROPERLY FOLLOWED PRECEDENT HOLDING THAT A PERSON'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE ARE VIOLATED WHEN HE IS TREATED BY THE GOVERNMENT AND ITS OFFICIALS DIFFERENTLY FROM OTHERS SIMILARLY SITUATED AS A RESULT OF A TOTALLY ILLEGITIMATE ANIMUS AGAINST HIM .....	9
II. THE PETITION FOR A WRIT OF <i>CERTIORARI</i> SHOULD BE DENIED IN THAT THE OPINION OF THE COURT OF APPEALS DOES NOT REPRESENT AN EXPANSION OF PRECEDENT BECAUSE, CONTRARY TO THE ARGUMENTS MADE BY THE PETITIONERS, AN EQUAL PROTECTION CLAIM DOES NOT HAVE TO BE BASED ON AN "ORCHESTRATED CAMPAIGN OF OFFICIAL HARASSMENT," AND THE ALLEGATIONS OF THE AMENDED COMPLAINT IN THIS CASE SHOW THAT THE PETITIONERS' ACTIONS WERE NOT MOTIVATED BY A LEGITIMATE STATE OBJECTIVE .....	14
CONCLUSION .....	19

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>PAGE</b>
<i>Bates v. Baltimore &amp; Ohio R.R. Co.</i> , 9 F.3d 29 (7th Cir. 1993) . . . . .	11
<i>Burt v. City of New York</i> , 156 F.2d 791 (2d Cir. 1946) . . . . .	13, 18
<i>Ciechon v. City of Chicago</i> , 686 F.2d 511 (7th Cir. 1982) . . . . .	13, 16
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) . . . . .	14
<i>Dubuc v. Green Oak Township</i> , 958 F.Supp. 1231 (E.D. Mich. 1997) . . . . .	12
<i>Edwards v. City of Goldsboro</i> , 981 F.Supp. 406 (E.D.N.C. 1997) . . . . .	12
<i>Esmail v. Macrane</i> , 53 F.3d 176 (7th Cir. 1995) . . . . .	9, 10, 11, 13, 15, 16
<i>Futernick v. Sumpter Township</i> , 78 F.3d 1051 (6th Cir. 1996), <i>cert. denied</i> , 519 U.S. 928, 117 S.Ct. 296, 136 L.Ed.2d 215 (1996) . . . . .	12
<i>Hishon v. King &amp; Spaulding</i> , 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) . . . . .	17

<i>Indiana State Teachers Association v. Board of School Commissioners</i> , 101 F.3d 1179 (7th Cir. 1996) . . . . .	13
<i>Jackson Court Condominiums, Inc. v. City of New Orleans</i> , 874 F.2d 1070 (5th Cir. 1989) . . . . .	13
<i>LeClair v. Saunders</i> , 627 F.2d 606 (2d Cir. 1980), <i>cert. denied</i> , 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981) . . . . .	13
<i>Lockery v. Leavitt Tube Employees' Profit Sharing Plan</i> , 748 F.Supp. 662 (N.D. Ill. 1990) . . . . .	11
<i>Olech v. Village of Willowbrook</i> , 160 F.3d 386 (7th Cir. 1998) . . . . .	9, 13, 14
<i>Rubinovitz v. Rogato</i> , 60 F.3d 906 (1st Cir. 1995) . . . . .	13
<i>Sarantakis v. Village of Winthrop Harbor</i> , 969 F.Supp. 1095 (N.D. Ill. 1997) . . . . .	10, 11
<i>United States v. Ortiz</i> , 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) . . . . .	12
<i>Yerardi's Moody Street Restaurant &amp; Lounge, Inc. v. Board of Selectmen</i> , 878 F.2d 16 (1st Cir. 1989) . . . . .	13, 16
<i>Zeigler v. Jackson</i> , 638 F.2d 776 (5th Cir. 1981) . . . . .	13, 15, 16



**Constitutional Provisions:**

U.S. Const. Amend. V . . . . .	17
U.S. Const. Amend. XIV, § 1 . . . . .	15

**Statutes:**

42 U.S.C. §1983 . . . . .	1, 2
42 U.S.C. §1988 . . . . .	8

**Rules:**

Fed.R.Civ.P. 12(b)(6) . . . . .	1, 8
---------------------------------	------

**STATEMENT OF THE CASE****I. Nature of the Case**

The Respondent, Grace Olech ("Olech" or "Mrs. Olech"), filed this action against the Petitioners, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the United States constitution. The Petitioners filed a motion to dismiss Mrs. Olech's Amended Complaint under Fed.R.Civ.P. 12(b)(6), and the district court granted that motion and entered judgment for the Petitioners. The Court of Appeals for the Seventh Circuit reversed, and the case has been redocketed in the district court.

**II. Statement of Facts**

This action was commenced on July 11, 1997, when Grace Olech filed her Complaint (Doc. 1-1) in the United States District Court for the Northern District of Illinois, Eastern Division, against Willowbrook, Pretzer, and Modaff. (References will be to the document numbers placed on the matters in the record by the clerk of the court and to page numbers of the respective documents. In the case of the Amended Complaint, a copy of which is set forth in the Appendix hereto, references will be to paragraphs of the Amended Complaint.) On October 8, 1997, Mrs. Olech filed an

Amended Complaint (Doc. 8), having received leave of court to do so. (Doc. 7)

In her Amended Complaint, Mrs. Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (Par. 3) Mrs. Olech brought the lawsuit under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. (Par. 1)

According to the Amended Complaint, on August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Par. 7) Howard Brinkman's claims in the state court were dismissed for want of prosecution on April 1, 1991. (Par. 8) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of \$20,000.00, and judgment was entered on the verdict. (Par. 9) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of \$135,000.00, and judgment was

entered on that verdict. (Par. 10) Grace Olech<sup>1</sup> is Phyllis Zimmer's mother. (Par. 3)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs in the state court lawsuit on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Par. 11) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (Par. 12)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. (Par. 13) Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (Par. 14) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. (Par. 15) The Olechs then im-



plemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose. (Par. 16) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (Par. 17)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (Par. 18) There is nothing in the record to suggest that this plan contemplated dedication of Tennessee Avenue to Willowbrook or its paving or the installation of sidewalks.

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (Par. 19) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (Par.

20) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (Par. 21)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (Par. 22)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (Par. 23-24) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (Par. 25)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated

street as a condition of the extension of the water main were not consistent with the policy of Willowbrook regarding other property in Willowbrook. The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

(Par. 26)

The Amended Complaint alleges that the Petitioners treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit *and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.* (Par. 27) The Amended Complaint alleges that the Petitioners' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (Par. 28)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street demanded by the Petitioners were not consistent with what the Petitioners required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (Par. 29) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (Par. 30)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (Par. 31) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (Par. 32)

The Amended Complaint alleged that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Par. 33) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and



Thaddeus Olech were without running water from November of 1995 until the project was completed on March 19, 1996. (Par. 34) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Par. 35) The Amended Complaint alleges that the initial refusal of the Petitioners to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Petitioners in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (Par. 36) Finally, the Amended Complaint alleged that the actions and inactions of the Petitioners set forth therein were undertaken under color of state law. (Par. 37) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988.

The Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). (Doc. 9) Following briefing of the motion to dismiss, the district court granted the motion and dismissed the

action. (Docs. 20, 21, 22) Grace Olech filed a timely Notice Of Appeal (Doc. 23), and, following briefing and argument, the Court of Appeals for the Seventh Circuit reversed. *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998).

## REASONS FOR DENYING THE WRIT

### I.

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONERS DID NOT PROPERLY RAISE BELOW THE CONTENTION THAT THEY SEEK TO RAISE HERE, AND BECAUSE THE COURT OF APPEALS IN THIS CASE PROPERLY FOLLOWED PRECEDENT HOLDING THAT A PERSON'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE ARE VIOLATED WHEN HE IS TREATED BY THE GOVERNMENT AND ITS OFFICIALS DIFFERENTLY FROM OTHERS SIMILARLY SITUATED AS A RESULT OF A TOTALLY ILLEGITIMATE ANIMUS AGAINST HIM.**

In the district court, in response to Mrs. Olech's Amended Complaint, the Petitioners filed a Motion To Dismiss Plaintiff's Amended Complaint (Doc. 9) along with a Memorandum Of Law In Support Of Motion To Dismiss. (Doc. 10) In their memorandum, the Petitioners did not argue that an equal protection claim could not be brought by a "class of one" where the plaintiff does not allege membership in a vulnerable group. In fact, in their memorandum, the Petitioners referred to the type of equal protection claim approved in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), as "what has been colloquially known as 'Category Three' discrimination." (Doc. 10, p. 6) The defendants stated that "'Category Three' discrimination requires facts [sic]



which establish 'an orchestrated campaign of official harassment' directed at the individual 'out of sheer malice.'" (Doc. 10, p. 7) The defendants argued that Mrs. Olech's Amended Complaint lacked sufficient allegations of malice to state a claim for "Category Three" discrimination (Doc. 10, pp. 7-8), and that the allegations of the Amended Complaint showed that Mrs. Olech was not treated differently from other property owners. (Doc. 10, pp. 8-9) The Petitioners did not argue that the Equal Protection Clause does not protect people from "Category Three" discrimination, or that *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), had been incorrectly decided.

Mrs. Olech filed a response to the motion to dismiss (Doc. 18), and the Petitioners filed a reply. (Doc. 19) The Petitioners' reply had the following three argument headings: (1) "Plaintiff's Amended Complaint Fails to Sufficiently Allege Malicious Conduct" (Doc. 19, p. 1), (2) "Defendant's Conduct Was Not the Cause of Plaintiff's Injury" (Doc. 19, p. 4), and (3) "The Plaintiff Has Not Sufficiently Alleged Others Similarly Situated Were Treated Differently" (Doc. 19, p. 6). The defendants in a footnote implied that *Esmail* should be limited to cases involving the denial of licenses, and contended, citing *Sarantakis v. Village of Winthrop Harbor*, 969 F.Supp. 1095 (N.D. Ill. 1997), that equal protection claims based on the denial of government services, as opposed to the denial of government licenses, should be based on discrimination directed at groups, rather than individuals (Doc. 19, p. 2), but that footnote was not referred to by the district court, perhaps because it was simply a footnote to the Petitioners' argument that the amended complaint failed to sufficiently allege malicious conduct, or perhaps based on the rule that ar-

guments in support of a motion to dismiss not raised in the district court until the reply are deemed waived. (*Lockery v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D. Ill. 1990).) In this regard, it should also be noted that a party cannot raise an issue on appeal unless it is raised in a meaningful way below. *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29 (7th Cir. 1993).

The Petitioners' brief in the Court of Appeals for the Seventh Circuit contained the following argument headings: (1) "Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set Forth in the Case of *Esmail v. Macrane*," (2) "Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently," and (3) "Defendants' Conduct Was Not the Cause of Plaintiff's Injury." (Defendant's brief, p. 3) The closest that the defendants came to raising the issue that an equal protection claim cannot be brought on behalf of a "class of one" where the plaintiff does not allege membership in a vulnerable group was when they elaborated as follows on the contention in the footnote from their reply that *Esmail* should not be applied to cases involving the denial of government services as opposed to the denial of government licenses:

*Sarantakis* is also noteworthy because it, like the instant case, involved the denial of government services, as opposed to the refusal of a business license at issue in *Esmail*. *Sarantakis* holds that where the claim involves the denial of government services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp. at 1105. It is submitted by Defendants

that *Sarantakis*, rather than *Esmail*, controls this case and Plaintiff's alleged 'classification of one' does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro*, (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996); and *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236-37 (E.D. Mich. 1997)."

(Defendant's Brief, p. 15.)

The defendants did not urge the Court of Appeals for the Seventh Circuit to overrule its decision in *Esmail*, nor did the defendants argue in the Court of Appeals, as they are attempting to argue here, that no equal protection claim can be based on a "class of one," or that the equal protection clause protects people only insofar as they are members of vulnerable groups.

Because the defendants did not properly raise below the issue that they are seeking to raise in their petition for a writ of *certiorari*, nor did the defendants urge the Court of Appeals to overrule its decision in *Esmail*, which they are now contending improperly recognized equal protection claims based on a "class of one," the petition for a writ of *certiorari* should be denied. (See *United States v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623.) It should also be noted in this regard that this case was decided on the pleadings, and that the evidentiary facts have not been developed either through summary judgment proceedings or trial.

Moreover, even if the defendants had properly raised below the issue that they are seeking to raise in their petition for a writ of *certiorari*, this Court should decline to grant the writ because the Court of Appeals for

the Seventh Circuit in this case properly followed precedent holding that the equal protection clause is violated when the government treats a person differently from others similarly situated as a result of a "totally illegitimate animus toward" the person. (160 F.3d 386, 388.) This equal protection analysis has been approved by many courts. As stated in *Indiana State Teachers Association v. Board of School Commissioners*, 101 F.3d 1179, 1181 (7th Cir. 1996):

"This court has upheld an equal-protection claim in two 'class of one' cases, in which a governmental body treated individuals differently who were identically situated in all respects rationally related to the government's mission. In *Esmail v. Macrane*, supra, a liquor dealer was denied the renewal of his license solely because of the mayor's spite. In *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982), two paramedics were identically responsible for the death of a patient, yet only one was disciplined and the city was mysteriously unable to give a reason (such as a desire to economize on enforcement resources or even to randomize enforcement, as in the ancient military practice of decimation) for the difference in treatment. There are similar cases in other circuits. *Rubinovitz v. Rogato*, 60 F.3d 906, 911-12 (1st Cir. 1995); *Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1083 (5th Cir. 1989) (dissenting opinion). While the prin-



cipal target of the equal protection clause is discrimination against members of vulnerable groups, the clause protects class-of-one plaintiffs victimized by 'the wholly arbitrary act.' *City of New Orleans v. Dukes*, 427 U.S. 297, 304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) (per curiam)."

Finally, it should be noted that the Petitioners argue that "[t]he lack of harmony between the *Esmail* doctrine and the decisions cited herein leave public officials . . . uncertain as to their rights . . . when making . . . these decisions." (Petition, p. 13.) Essentially, the Petitioners are saying that government officials need guidance from this Court as to whether it is constitutional for them to treat certain of the governed differently from others as a result of a "totally illegitimate animus." (*Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).) It is respectfully suggested that such guidance should not be needed.

## II.

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN THAT THE OPINION OF THE COURT OF APPEALS DOES NOT REPRESENT AN EXPANSION OF PRECEDENT BECAUSE, CONTRARY TO THE ARGUMENTS MADE BY THE PETITIONERS, AN EQUAL PROTECTION CLAIM DOES NOT HAVE TO BE BASED ON AN "ORCHESTRATED CAMPAIGN OF OFFICIAL HARASSMENT," AND THE ALLEGATIONS OF THE AMENDED COMPLAINT IN THIS CASE SHOW THAT THE PETITIONERS' ACTIONS WERE NOT MOTIVATED BY A LEGITIMATE STATE OBJECTIVE.**

The Defendants argue that "the opinion below authorizes an unwarranted expansion of a very narrow cause

of action for equal protection on behalf of a 'class of one'" because the opinion recognizes an equal protection claim in the absence of an orchestrated campaign of official harassment, and because the Petitioners' actions set forth in the Amended Complaint were related to a legitimate state objective. Both of these arguments are without merit. The Equal Protection Clause provides, in relevant part, "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. Amend. XIV, § 1.) There is nothing in the text or history of the amendment which would indicate, as the Petitioners have argued, that the clause can only be violated by an "orchestrated campaign of official harassment." As used by the defendants, the word "campaign" appears to connote an extended series of events.

In *Esmail* the Court of Appeals held that unequal treatment motivated by vindictive animosity violates the equal protection clause. (53 F.2d 176, 179.) Although the case of *Esmail* involved an orchestrated campaign of official harassment, the Court of Appeals in that case did not hold that a plaintiff could not allege an equal protection violation unless he could show such a campaign. What the Court required was that the plaintiff plead "unequal treatment" resulting from "animosity," vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, in *Esmail* the Court cited *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were vio-

lated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the Court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989), another case cited by the Court in *Esmail* as a case applying its holding, stated the principle as follows:

"[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." (Emphasis added.)

The Court in *Yerardi's* did not require a showing of "an orchestrated campaign of official harassment." Unequal treatment undertaken maliciously or in bad faith to injure a person is enough. Finally, the case of *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), cited by the Court in *Esmail* as a basis for its holding, did not involve an orchestrated campaign of official harassment. It involved action by the City of Chicago in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What these cases require is that the plaintiff plead unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved, and

Mrs. Olech has alleged that in this case. Contrary to the Petitioners' contention, the opinion of the Court of Appeals in this case does not represent "an unwarranted expansion of a very narrow cause of action for equal protection on behalf of a 'class of one.'" (Petition, p. 14)

Moreover, contrary to the argument of the Petitioners, the facts of the Amended Complaint, which must be taken as true at this stage of the proceedings (see *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)), state what the Petitioners' objective or motivation was for their conduct, and that was not a legitimate state objective. The Amended Complaint states that the Petitioners treated Mrs. Olech differently from other property owners in the village by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (Par. 27) It is not a legitimate state objective for the government to increase flooding on a person's private property out of spite or in order to retaliate against him for filing a lawsuit relating to stormwater management. It is not a legitimate state objective to take property, such as easement rights or rights to street dedication, from an owner without paying for such property (U.S. Const. Amend. V), nor, as a result of ill will, to demand such property rights from a property owner as a condition of receiving running water, when the government does not



demand such property rights of others as a condition of receiving running water. Nor is it a legitimate government objective to attempt to extort, by threat of withholding running water, property rights from a homeowner who has had the temerity to sue the government for flooding his property. The Petitioners' argument that the actions on their part were related to a legitimate state objective is simply an attempt to contradict the allegations of the Amended Complaint which, as noted above, is inappropriate at this stage of the proceedings. The Petitioners' arguments that they lacked malice and an intent to harass, and that Mrs. Olech was a random victim of governmental error are similar attempts by the Petitioners to contradict the allegations of the Amended Complaint, which cannot be done at this stage of the proceedings. In light of the allegations of the Amended Complaint, which must be accepted as true at this stage of the proceedings, it is absurd for the Petitioners to argue, as they do, that they were trying to "benefit" the Respondent and her neighbors, Mr. Brinkman and the Zimmers. (Petition, p. 16)

Finally the defendants have argued that the opinion of the Court of Appeals "will trigger innumerable lawsuits against municipalities and public officials brought by citizens claiming they were treated differently by a governmental entity motivated by ill will." (Defendants' petition, p. 19) In the first place, it is unlikely that the opinion of the Court of Appeals will have the effect that the defendants suggest because it does not represent a departure from long-standing precedent cited in Argument I hereof. (See, e.g., *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.)) Yet, even if it were likely to cause an increase in the number of

claims being brought, it would be a strange doctrine of constitution exegesis that would interpret the meaning of the language of the constitution in order to minimize the number of claims that could be brought. It would surprise the founding fathers, indeed, if a guiding principle in interpreting the constitution was to interpret the rights of the citizenry in as niggardly a fashion as possible.

### CONCLUSION

For the reasons stated herein, the Respondent, Grace Olech, respectfully requests that this Honorable Court deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

JOSETTE SKELNIK  
LAW OFFICES OF  
JOSETTE SKELNIK  
167 East Chicago Street  
Elgin, Illinois 60120  
(847) 742-5220

*Counsel of Record  
for Respondent*

## **APPENDIX**



App. 1

[Dated October 8, 1997]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
	)	
Plaintiff,	)	
-vs-	)	No. 97 C 4935
	)	
VILLAGE OF WILLOWBROOK,	)	Judge Marovich
an Illinois municipal corporation,	)	
GARY PRETZER, individually	)	Magistrate
and President of Defendant	)	Judge Keys
VILLAGE OF WILLOWBROOK,	)	
and PHILIP J. MODAFF,	)	Plaintiff Demands
individually and as Director of	)	Trial By Jury
Public Services of Defendant	)	
VILLAGE OF WILLOWBROOK,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

(42 U.S.C. § 1983)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

App. 2

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along

App. 3

with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately



determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

"The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22,

Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE

OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body

for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement,



along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.



35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

(a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;

(b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;

(c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

(d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer  
Attorney for the Plaintiff

JOHN R. WIMMER  
Attorney at Law  
928 Warren Avenue  
Downers Grove, Illinois 60515  
(630) 810-0005  
Attorney No. 03125600